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IN THE

Supreme Court of the United States

October Term, 1963

No. 100

DION TYRONE DIAMOND,

Petitioner,

—v.—

STATE OF LOUISIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York 19, New York

WILEY A. BRANTON
5 Forsythe Street, N. W.
Atlanta, Georgia

JOHNNIE A. JONES
530 South 13th Street
Baton Rouge, Louisiana

Attorneys for Petitioner

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BRIEF FOR PETITIONER

Opinions Below

The opinions below are not reported. The Nineteenth Judicial District Court for the Parish of East Baton Rouge filed a series of per curiam opinions ruling upon the petitioner's bill of exceptions which were dated November 8, 1962 (R. 27-44).

The Supreme Court of Louisiana entered an order on January 3, 1963 denying the applications for writs of certiorari, mandamus and prohibition (R. 145).

Jurisdiction

The judgment of the Supreme Court of Louisiana was entered January 3, 1963 (R. 145). The petition for certiorari was filed April 3, 1963, and granted May 27, 1963 (R.

150). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below and here the denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Louisiana Statutes Annotated, Revised Statutes, Section 14:103, appearing in Volume 9, 1963 Pocket Supplement, p. 54:

§14:103. *Disturbing the peace*

A. Disturbing the peace is the doing of any of the following in such manner as would foreseeably disturb or alarm the public:

(1) Engaging in a fistic encounter; or

(2) Using of any unnecessarily loud, offensive, or insulting language; or

(3) Appearing in an intoxicated condition; or

(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or

(5) Holding of an unlawful assembly; or

(6) Interruption of any lawful assembly of people; or

(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public.

Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars or imprisoned for not more than ninety days, or both.

B. Any person or persons, providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, while in or on the premises of another, whether that of an individual person, a corporation, a partnership, or an association, and on which property any store, restaurant, drug store, sandwich shop, hotel, motel, lunch counter, bowling alley, moving picture theatre or drive-in theatre, barber shop or beauty parlor, or any other lawful business is operated which engages in selling articles of merchandise or services or accommodation to members of the public, or engages generally in business transactions with members of the public, who shall:

(1) prevent or seek to prevent, or interfere or seek to interfere with the owner or operator of such place of business, or his agents or employees, serving or selling food and drink, or either, or rendering service or accommodation, or selling to or showing merchandise to, or otherwise pursuing his lawful occupation or business with customers or prospective customers or other members of the public who may then be in such building, or

(2) prevent or seek to prevent, or interfere or seek to interfere with other persons who are expressly or impliedly invited upon said premises, or with prospective customers coming into or frequenting such premises

in the normal course of the operation of the business conducted and carried on upon said premises, shall be guilty of disorderly conduct and disturbing the peace, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars or by imprisonment in the parish jail for not more than six months, or by both such fine and imprisonment. (As amended Acts 1960, No. 70, §1.)

Question Presented

Whether, where petitioner engaged in making speeches —an activity within the area of free expression protected by the Constitution—he was denied due process under the Fourteenth Amendment when convicted under a state law containing general and indefinite prohibitions against disturbing the peace which are not narrowly drawn to define and prohibit specific conduct?

Statement

Petitioner, Dion T. Diamond, was convicted of the crime of "disturbing the peace" (L. R. S. 14:103) in the Nineteenth Judicial District Court of Louisiana, Parish of East Baton Rouge. Petitioner was charged in that Court by an information (R. 1) filed March 8, 1962, in case No. 42,917 which alleged that on January 30 and 31, 1962, he

> . . . unlawfully did violate L. R. S. 14:103 in that he, not a student of Southern University, did enter upon the premises of Southern University and there engage in and encourage students of Southern University to hold unruly, unauthorized demonstrations on the Campus and did lead and encourage said students to march through the University buildings while classes were being conducted and did encourage said students

> to boycott and leave the classes in such manner as would foreseeably disturb and alarm the public. . . .

Petitioner was arraigned and entered a plea of not guilty on March 8, 1962 (R. 45). On March 12, 1962, the trial court entered an order over petitioner's objection, granting the State's motion to consolidate this case with five separate charges then pending against petitioner[1] (R. 45). At a subsequent proceeding, however, case No. 42,917 was tried separately (*cf.* R. 56) and petitioner was convicted only on this charge. Review here is sought therefore on the conviction of the charge quoted above. Charges of unlawful assembly and of interrupting lawful assemblies which arose out of the same activities of the petitioner during the period January 29 through February 1, 1962, were pending against the petitioner when this case was tried.[2]

Before trial petitioner filed an application for a bill of particulars (R. 14) and a motion to quash the information (R. 4), both of which were overruled (R. 47). Trial was held on May 8, 1962, and petitioner was found "guilty as charged" (R. 44) by the Court sitting without a jury. A motion for new trial (R. 16) was overruled May 24, 1962 (R. 48). In the motion to quash and the motion for new trial petitioner raised federal constitutional objections asserting that the statute as applied to him was unconstitutionally vague and that it violated his rights to free speech and assembly.

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[1] In addition to the above charges, five other informations (R. 7-13) were filed against petitioner. Case No. 42,612 charges petitioner with refusing to leave the premises of Southern University after being requested to do so in violation of L. R. S. 14:103.1; Case No. 42,615 charges petitioner with holding unlawful assemblies, and Case No. 42,616, with interrupting lawful assemblies, both constituting a violation of L. R. S. 14:103. Petitioner is also charged with vagrancy under L. R. S. 14:107 and with trespass under L. R. S. 14:63. See also R. 56.

[2] R. 56, and see note 1, *supra*.

Petitioner was sentenced to pay a fine of $100 and costs, or in default of the fine, to be confined in the parish jail for 30 days, and, in addition, to be confined in the parish jail for 60 days (R. 49).

On November 8, 1962, the trial court filed a series of per curiams to petitioner's bill of exceptions (R. 21-44). Thereafter, petitioner applied to the Supreme Court of Louisiana for writs of certiorari, mandamus and prohibition seeking to invoke the court's supervisory powers (R. 133). The writs were denied January 3, 1963, in an order by the Supreme Court of Louisiana stating:

> The application is denied. We find no error in the rulings complained of (R. 145).

Execution of the judgment was stayed for 90 days on January 10, 1963, to allow petitioner to seek review in this Court (R. 149).

The events leading to petitioner's arrest were as follows: Southern University in East Baton Rouge Parish, Louisiana is a school having about 4400 students (R. 96). The school had been the scene of a series of demonstrations and meetings by students from December 15, 1961 until the time of petitioner's arrest on February 1, 1962 (R. 74). Some students at Southern were boycotting classes until the situation of students who had been arrested in anti-segregation demonstrations was resolved with the school (R. 97, 99, 100). Dion T. Diamond, who was not a student at Southern University, was first observed on the campus by the State's witnesses (University employees) on January 30, 1962. The evidence at the trial related to a series of speeches made by Diamond to students in a quadrangle on the campus on January 30 and 31, 1962. There was also evidence as to the circumstances of his arrest on February 1, 1962. There was no evidence that petitioner was ever ordered not to

enter the campus, or to leave it; nor was there any evidence that he was ever told that he could not make speeches on the campus or that he needed permission to do so. The University registrar testified that the school was a public institution, and that "anyone may come there who wishes" (R. 56).

1. Events of January 30, 1962

Between 9:30 and 10:00 A.M. on this date, Diamond was observed by Dean of Students Marvin Harvey. Dean Harvey testified that Diamond was addressing three or four hundred students in a quadrangle building near the student union, and "talking about the importance of demonstrating and staying out of classes" (R. 87). Following this meeting, which lasted about fifteen minutes, the students dispersed in various directions (R. 88). The Dean stated that during the speech the students were listening, clapping and indicating "expressions of approval" (R. 88). Dean Harvey further stated that he did not authorize Diamond to hold a meeting (R. 89).

That afternoon at about 1:00, Dean Harvey observed about forty students walking around the campus with signs (R. 89).

2. Events of January 31, 1962—Morning

Diamond made another speech at the same place between 9:15 and 9:45 a.m. before a group estimated by the school's chief security officer William Pass at two to three hundred (R. 60), and estimated by Dean Harvey at four to five hundred (R. 89). Pass stated that this was a regular school day, but that students at the time had been boycotting classes on the campus for three or four days (R. 61-62; 78). In his speech Diamond told the students not to go to classes; that the faculty supported them and had signed

some type of petition; and that they should show their gratitude by not going to classes (R. 62). Dean Harvey said that the tenor of the speech was the same as that of the previous day (R. 90); that he had not authorized the meeting (R. 90); that it lasted between twelve and twenty minutes (R. 90); and that he started toward Diamond to inform him that he did not have permission to hold the meeting, but that Diamond ceased speaking and the group dispersed before he got there (R. 89-90).

3. Events of January 31, 1962—Afternoon

Diamond spoke to another group of students during the noon hour on January 31. Security Officer Pass estimated that there was about the same number or possibly more students at this gathering than at the morning speech (R. 62); his assistant, Willie Harris, estimated that five to six hundred students were assembled (R. 107). Pass stated that "Diamond told the students that we will go through the classrooms and if necessary we will put them out of the classrooms" (R. 63). Harris said that Diamond was pleading for more followers from the student body (R. 110); that he urged the students to stay out of classes and was calling for at least fifty per cent of the students to support him (R. 110); and that Diamond told the students "let's go through the classrooms" (R. 111). Dean Harvey described this speech as "concerned principally [with] the boycotting of classes" (R. 90).

According to Dean Harvey, about one hour after this speech he observed at least one hundred students beginning to go through the classroom building with signs; that this was a noisy procession which disturbed people in the buildings where classes were being conducted at the time; and that this lasted over half an hour (R. 90-91). Mr. Pass said that the students were walking on the campus and through the classrooms singing and stomping in a very loud

manner which caused a disturbance for over an hour (R. 64-65); that they carried signs (R. 64-67); and that classes in progress were disturbed (R. 64-65). His assistant, Harris, also recounted this event, saying that the students were "pulling on doors, stomping on the halls" (R. 110); and that they were disturbing the classes (R. 110). No witness testified that anyone was actually "pulled" from the classroom. Pass testified that no one was injured and that there were no fights (R. 85).

None of the witnesses testified that Diamond did anything but make the speeches mentioned above. No witness testified that Diamond entered any University building. Pass and Harris both stated that they did not see Diamond in any of the buildings (R. 75-76; 110-111). No witness testified that Diamond carried any signs or participated in making them (*cf.* R. 73). On cross examination Pass was asked:

> Q. Now, what did the accused do other than to make a speech? A. That is all I witnessed him doing. He just made a speech (R. 78).

4. Events of January 31, 1962—Evening

At about 6:00 P.M. on January 31, an official meeting of the student senate was held in the "old gymnasium", at which Dean Harvey announced that this was the only authorized student meeting, and the president of the student senate, Murphy Jackson, spoke, urging the students to go to classes. Murphy Jackson testified that Diamond sought permission to speak, and, when this was refused, Diamond, with several other students, left without disturbing the meeting (R. 121). Shortly afterwards, there was an impromptu outdoor gathering outside the "new gymnasium" at which Diamond and a number of students spoke (R. 94-95; 128). Defense witnesses testified that on this occasion

Diamond reprimanded the students for reportedly having gone through the classroom building that afternoon (R. 125, 126, 128-129).

5. Events of February 1, 1962

On the morning of February 1, Diamond arrived on the campus in a taxicab with several other persons (R. 129-130). As soon as he got out of the taxicab he was placed under arrest by the assistant security officer, Willie Harris, who was also a deputy sheriff (R. 72-73, 84, 104). Harris was accompanied by Chief Security Officer Pass who drove Diamond and Harris to the Baton Rouge jail. Pass and Harris testified that on this occasion they merely observed Diamond getting out of the taxicab and that Harris immediately placed Diamond under arrest. Harris had no arrest warrant (R. 104-105). Harris stated that he had wanted to arrest Diamond on the previous day during the noon speech, but had been unable to reach him because of the crowd (R. 109). He stated that he arrested Diamond for "holding an unlawful assembly" the previous day (R. 106); and that no one told him to make the arrest (R. 108). Pass denied having ordered or requested Harris to make the arrest, or having made the arrest himself (R. 83).

ARGUMENT

Petitioner Was Denied Due Process by His Conviction for Making a Series of Speeches Under a Statute Too Vague and Indefinite to Fairly Describe the Conduct Prohibited or to Provide an Ascertainable Standard of Guilt.

Louisiana's case against petitioner is founded upon the content of one or more of the speeches he made to students on the Southern University campus, and not upon a claim that petitioner did anything other than talk. The information charges a series of activities, each of which included a component of speech. Thus, there were allegations that he did "engage in and *encourage* students . . . to hold unruly, unauthorized demonstrations . . . " and did "lead and *encourage* . . . students to march . . . ," and did "*encourage* . . . students to boycott and leave the classes . . . " (R. 1; emphasis supplied). The trial court's description of the evidence which it found sufficient to sustain the conviction referred to petitioner's speeches, and not to any non-verbal conduct (R. 40).[3] The State's Brief in Opposi-

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[3] In ruling upon Bill of Exception No. 7 relating to overruling defendant's motion for a directed verdict, the court described the basis of its finding of guilt as follows (R. 40):

> "The court overruled the motion for the reason that the state, in the opinion of the court, had sustained its burden of proving the guilt of the defendant beyond a reasonable doubt. Reliable, competent evidence offered by the state showed that the defendant, a non-student, was present on the campus of Southern University on the dates alleged in the bill of information, and while there did, in speeches made by him in meetings not authorized by those in charge of such matters, encourage and exhort Southern University students to boycott classes and to march into the classrooms while classes were in session and to disrupt the classes, even to the extent of pulling the students from the classrooms, in such a manner as would foreseeably disturb and alarm the public."

tion to Certiorari, pp. 5-6, urges that petitioner's words made him liable as an abettor of the acts of other students. The conviction could not validly rest on a theory that petitioner did anything other than speak, since clearly there was no evidence that he did anything else (R. 78). Cf. *Thompson* v. *Louisville,* 362 U. S. 199.

Both the information (R. 1) and the trial court's per curiam No. 7 (R. 40) make it clear that a part of the basis for petitioner's conviction was his advocacy of a boycott of classes at Southern University. The conviction does not rest only on the charge that petitioner urged students to march around and disrupt classes. It also rests on his advocacy that students voluntarily attending a public University refuse to attend classes to protest the treatment of students arrested for taking part in antisegregation demonstrations (R. 97-99). Such speech on a social issue of public importance is within the bounds of lawful advocacy. "Abstract discussion is not the only species of communication which the Constitution protects". *NAACP* v. *Button,* 371 U. S. 415, 429. There is "a right to persuade to action, not merely to describe facts". *Thomas* v. *Collins,* 323 U. S. 516, 537. But even if it might validly be prohibited by a state, it surely cannot be controlled by a vague and general law which does not indicate a legislative determination that such speech creates a clear and present danger to some legitimate state interest. *Cantwell* v. *Connecticut,* 310 U. S. 296, 311.

Given the application of LSA-R.S. 14:103 to conduct within the area of free speech and expression, petitioner's due process vagueness claim must be appraised in the light of the specially strict standards of statutory specificity applicable to laws "having a potentially inhibiting effect on speech." *Smith* v. *California,* 361 U. S. 147, 151; *NAACP* v. *Button,* 371 U. S. 415, 432, and cases cited; cf. *United*

States v. *National Dairy Prod. Corp.*, 327 U. S. 29, 36. The application of the vagueness doctrine as a means of providing "clearance space for individual freedoms," [4] is exemplified by the *Button* case, *supra*, where the Court said:

> Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U. S. 296, 311 (371 U. S. at 433).

The stifling effect vague laws have on the right of free expression has led the Court to say that "Broad prophylactic rules in the area of free expression are suspect" and that "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438. See *Edwards* v. *South Carolina*, 372 U. S. 229; *Wright* v. *Georgia*, 373 U. S. 284; *Cantwell* v. *Connecticut*, 310 U. S. 296.

Petitioner submits that he was tried and convicted under subsection A(7) of §14:103, prohibiting the "Commission of any other act in such a manner as to unreasonably disturb or alarm the public," and that this provision is too vague and indefinite to be applied to conduct within the area of free speech. Although neither the prosecutor nor the trial court expressly stated in the courts below which subsection of the law was relied upon to support the charge and conviction, a variety of factors support petitioner's assertion that it was subsection A(7). This is true notwithstanding the unsubstantiated claim made for the first time by the State in this Court that the conviction rests upon subsection A(6) prohibiting the "interruption of any lawful assembly of people." The factors indicating that petitioner was tried under subsection A(7) require some explanation.

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[4] See Amsterdam, Note, The Void-For-Vagueness Doctrine, 109 U. Pa. L. Rev. 67, 75-85 (1960).

First, the information itself alleges a series of acts by petitioner, none of which, either separately or when read together, come within the terms of subsections A(1) to (6). Subsection A(6) now relied on by the State prohibits an "interruption" of a lawful assembly, but no such "interruption" is alleged in the information. It alleged that petitioner "did lead and encourage students to march through the University building while classes were being conducted," but did not allege that classes were "interrupted." The natural inference from the fact that none of the acts specified in subsections A(1) to (6) are mentioned, is that the information was intended to invoke subsection A(7), the catch-all provision applying to "any other act."

Secondly, petitioner filed a motion for new trial saying that he had not engaged "in any activity that had been denounced as a crime by LSA-R.S. 14:103(7) of 1950, as amended, the statute under which the defendant is charged" (R. 16). In overruling this motion the trial court said nothing to contradict petitioner's assumption that subsection 7 was the provision involved (R. 43). And, in ruling on petitioner's vagueness claim (made in the motion to quash without mention of subsection 7 (R. 4-5)), the Court's opinion discussed subsection 7 and cited decisions upholding it as sufficiently definite (R. 28-29). Petitioner also argued in the Louisiana Supreme Court that he was convicted under subsection 7, but that Court affirmed without discussion (R. 134, 136, 142).

Thirdly, the trial court and the parties were aware of the fact that a separate information against petitioner under Section 14:103, which used the words of subsection 6 (R. 12), was pending at the time of the trial (R. 56-57). This charge had not been abandoned by the prosecutor who took pains to obtain a stipulation that testimony of a witness in this trial could be used at any subsequent trial of

the charge of interrupting a lawful assembly (Case No. 42,616) (R. 56-57).

Fourthly, the notion that the trial court conceived the case as one under subsection 6, based on a theory that petitioner was liable for interrupting classes by counselling others who actually did this, is entirely inconsistent with statements made by the Court in a long colloquy with counsel during the trial (R. 100-102) and in a per curiam (R. 38-39). For example, the Court said, "Whether they were responsive to his exhortations makes no difference" (R. 100), and "it wouldn't have to follow that there was actually boycotting or that there was actual demonstrating as long as he urged it. . . ." And, subsequently:

> Now what I am saying is whether the doings or the actions of the accused did actually create a turmoil and disturbance is something else again, it is not necessary to prove that. It is just like if somebody is using obscene language or engaging in a fight in public that is calculated to alarm and disturb the peace. Actually you might have some hardened souls standing around there who wouldn't be disturbed at all (R. 101-102).

And again at R. 102:

> . . . but when he made speeches advocating the boycotting of classes, he is presumed by law to know that very probably that very thing that he is advocating is going to follow, and it is a consequence of his actions, but I am not saying it is absolutely necessary to show the consequences, but it is admissible.

Thus, the Court quite clearly regarded the mere advocacy of boycotting, without regard to the effect on others as basis for conviction; the per curiam expresses this same theory (R. 38-39). This theory is much more likely to have

been founded on subsection 7 forbidding "any other act in such a manner as to unreasonably disturb or alarm the public," than upon subsection 6 which could apply to mere advocacy of a boycott only by a fiat of construction ignoring the natural tendency of its words to refer to an *actual* interruption of an assembly.

Thus, all of the things in the record which do tend to indicate that any particular part of the law was the basis for the charge and conviction point to subsection 7 and not to subsection 6. (One possible exception points to subsection 5, e.g., a statement by the arresting officer that he arrested Mr. Diamond for "Holding an unlawful assembly" (R. 106). The State does not rely upon subsection 5 in the Brief in Opposition to Certiorari).

Assuming that the conviction is based upon subsection 7, it is clear that it must fail as a denial of due process, because this provision is so general and sweeping, and could cover such a wide variety of speech, both within and without the area of lawful advocacy, that it fails to define any crime, leaving the task of definition for the tribunal deciding a particular case. This Court had occasion to consider an earlier claim that subsection 7 was unconstitutionally vague, but did not find it necessary to decide the issue. *Garner* v. *Louisiana*, 368 U. S. 157, 165, note 13. Mr. Justice Harlan's concurring opinion in *Garner, supra*, at 368 U. S. 205-207, did view this subsection as unconstitutionally vague as applied to punish speech or expression, relying upon *Cantwell* v. *Connecticut*, 310 U. S. 296. Mr. Justice Harlan wrote (368 U. S. at 207):

> For the statute by its terms appears to be as applicable to "incidents fairly within the protection of the guarantee of free speech," Winters v. New York, supra (333 U. S. at 509), as to that which is not within the range of such protection. Hence such a law gives no

warning as to what may fairly be deemed to be within its compass. See Note, 109 U of Pa L Rev 67, 75-76, 99-104 (1960).

In this case (R. 28-29), as in *Garner, supra*, the Louisiana courts have referred only to the definition of disturbing the peace given in an earlier case (*Ponchatoula* v. *Bates*, 173 La. 824, 827, 138 So. 851, 852) where it was said to include "any act or conduct of a person which molests the inhabitants in the enjoyment of that peace and quiet to which they are entitled, or which throws into confusion things settled, or which causes excitement, unrest, disquietude, or fear among persons of ordinary normal temperament." To support its holding on the vagueness issue, the trial court even relied upon the Louisiana Supreme Court's ruling in *Garner* and its companion cases—without observing that it was reversed here on other grounds (R. 29). It is obvious, then, that this case does involve a vague and generalized conception of "disturbing the peace"; that the law has not been limited by construction;[5] and that the law is applied here as it was in *Garner* to conduct within the area of speech and expression. This Court's opinions teach that such convictions deny due process. *Cantwell* v. *Connecticut, supra; Thornhill* v. *Alabama*, 310 U. S. 88, 105; *Terminiello* v. *Chicago*, 337 U. S. 1; *Edwards* v. *South Carolina*, 372 U. S. 229.

It has been asserted above that the convictions rest on subsection 7. Whatever doubt is cast on this proposition by the state's claim in this Court that the case rests on subsection 6 cannot save the conviction. For at best the state's theory cannot entirely remove the possibility that the trial court decided the case on the theory that the conviction was

[5] The Louisiana Supreme Court itself questioned the validity of an earlier general "disturbing the peace" law applied to religious expression in *State* v. *Sanford*, 203 La. 961, 14 So. 2d 778.

proper, at least in part, under subsection 7. *Stromberg* v. *California*, 283 U. S. 359, makes it clear that where the possibility that a conviction rests on an unconstitutionally vague portion of a law cannot be excluded, the conviction cannot be allowed to stand on the theory that it *might* rest on another portion of the law not subject to the same infirmity. In *Stromberg* a conviction under a general verdict, which failed to specify which of three statutory clauses supported it, was reversed where one of those clauses was unconstitutionally vague. The Court said that "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld" (283 U. S. at 368). The principle has been frequently applied in other cases. *Terminiello* v. *Chicago*, 337 U. S. 1, 5, rests on this doctrine. So do *Williams* v. *North Carolina*, 317 U. S. 387, 292, and *Thomas* v. *Collins*, 323 U. S. 516, 528-529. See also *Cramer* v. *United States*, 325 U. S. 1, 36, note 45; *Yates* v. *United States*, 354 U. S. 298, 312. Cf. *Sunkist Growers* v. *Winckler & Smith Co.*, 370 U. S. 19, 29-30, applying an analogous principle in a civil case. *Thomas* v. *Collins*, 323 U. S. 516, was a non-jury criminal contempt case, demonstrating that the absence of a jury does not affect the vitality of the *Stromberg* principle. In *Thomas*, the court held that where a defendant had been convicted of contempt on a general finding of guilt that made no distinction between a charge that he solicited a specific individual to join a union and a charge that he urged that an entire audience join the union, the judgment "must be affirmed as to both or as to neither" (323 U. S. at 528-529). In *Terminiello*, *supra* (337 U. S. at 5), one instruction to the jury (to which no specific objection was made) embraced an unconstitutional theory which might have been the basis of the jury's verdict; *Stromberg* was held to be controlling. *Stromberg*, should control this case as well since it is plainly possible, and indeed it is very probable,

that the unconstitutionally vague subsection 7, was considered by the trial court in whole or in part to justify the conviction.

The state's arguments that the several subsections of the statute are severable is quite beside the point. Severability would be relevant if petitioner complained of several separate convictions, each under a different portion of the law. But, it has no bearing on the application of the *Stromberg* principle to this case.

Indeed, *Stromberg* and *Thomas* v. *Collins*, 323 U. S. 516, furnish a rule that compels reversal of the petitioner's conviction even if complete acceptance is given to the state's position that the conviction rests only upon subsection 6 (relating to interruption of a lawful assembly) and subsection 7 is disregarded entirely. This is true because the conviction rests upon several alleged acts, at least one of which this statute plainly fails to warn against.[6] If the information does, as the state contends, charge a crime under the clause prohibiting "interruption of any lawful assembly", that charge embraces each of the acts mentioned in the information, i.e. (1) engaging in and encouraging students to hold unruly, unauthorized demonstrations, *and* (2) leading and encouraging students to march through University buildings while classes were being conducted, *and* (3) encouraging students to boycott and leave the classes; all "in such manner as would foreseeably disturb and alarm the public". The trial court made clear that the evidence that petitioner engaged in encouraging students to boycott and leave classes formed a part of the basis for the conviction *in addition to* the evidence which the court held proved that petitioner urged students

[6] In *Thomas* v. *Collins*, 323 U. S. 516, the court held that where a single conviction rested on two acts, and one act was constitutionally protected, the conviction must fall.

to march into the classroom buildings and disrupt the classes. This finding appears at R. 40:

> Reliable, competent evidence offered by the state showed that the defendant, a non-student, was present on the campus of Southern University on the dates alleged in the bill of information, and while there did, in speeches made by him in meetings not authorized by those in charge of such matters, *encourage and exhort Southern students to boycott classes and to march into the classrooms* while classes were in session and to disrupt the classes, even to the extent of pulling the students from the classrooms, in such a manner as would foreseeably disturb or alarm the public (emphasis added).

That encouragement of a boycott was at least a part of the basis of petitioner's conviction is further reinforced by the fact that such encouragement was the only act charged common to both days cited in the information.

The conviction must fail because nothing in subsection 6 (or any other part of §14:103)[7] warns that encouraging students to boycott classes is punishable as disturbing the peace. It is no answer to say, as Louisiana does, that petitioner was convicted for counseling others to commit a crime, for his conviction also rests on his mere advocacy of a boycott. Certainly nothing in §14:103A(6) evinces any legislative determination that for a person to urge state college students voluntarily attending school to boycott classes is a type of speech that the state cannot and will not tolerate. Such a law, expressly prohibiting this advocacy would in petitioner's view represent the type of state imposition of orthodoxy in speech and thought which the First Amendment strikes down. Whatever the resolu-

[7] This reasoning applies equally to subsection 7. See page 12, *supra*.

tion of that issue might be, it seems clear that a vague criminal law cannot be used to suppress and punish the expression of such views. The unfairness resulting from the failure of subsection 6 to warn that the advocacy of a boycott is prohibited is accentuated by the possibility that the trial judge based his judgment upon the theory which he expressed orally during the trial (R. 101-102), and in an opinion written later (R. 39), e.g. that *mere advocacy* of such a boycott (without regard to the consequence of the advocacy) was punishable under the statute. The Court's expressed indifference on the question of whether petitioner's advocacy caused the student march (which occurred about an hour after his speech), is further indicated by the fact that the Court did not mention causation in describing the evidence thought to sustain the charge (R. 40). Of course, subsection 6 gives no warning at all that it is subject to such an interpretation which would require it to punish advocacy of interruptions of lawful assemblies whether the interruptions actually take place or not. Each of the subsections of §14:103A relates back to prefatory language concerning "doing any of the following in such manner as would foreseeably disturb or alarm the public". It is, of course, very strange indeed to speak of the foreseeability of that which never happened; but the trial court's construction of the statute would require such a concept. The direct effect of the ruling was to deny petitioner an opportunity to show that his speech did not cause the student demonstrations (R. 38-39; 100-102).

The language in the prefatory clause of §14:103A, requiring that all the acts be done "in such a manner as would foreseeably disturb or alarm the public", does nothing to make any of the subsections clearer. Indeed the notion of punishing disturbing or alarming speech runs contrary to the First Amendment. *Terminiello* v. *Chicago*, 337 U. S. 1, 4-5.

Petitioner's submission then is that the unfair vagueness of the statute under which he was charged and convicted is demonstrable whatever view is taken on the issue as to which provision of §14:103 was the basis of the conviction. This vague law is not only unfair to petitioner because its inexplicit command threatens his right of free speech in advance. It also works unfairly against him after he has spoken; he cannot know how to defend himself against a charge of violating §14:103 because the statute contains nothing to indicate what he might prove or what allegations he might disprove in order to escape the prohibitions of the law. The fact that the information did allege certain acts alleged to constitute the crime cannot cure the vagueness of the statute. As the Court observed in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453:

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U. S. 214, 221; Czarra v. Medical Supers., 25 App. D. C. 443, 453. *It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.* See Stromberg v. California, 283 U. S. 359, 368; Lovell v. Griffin, 303 U. S. 444. (Emphasis added.)

Indeed, the vagueness of §14:103 subjects petitioner to substantially the same evils denounced in *Russell* v. *United States*, 369 U. S. 749 (where the Court reversed convictions based upon a vague indictment), and in *Cole* v. *Arkansas*, 333 U. S. 196 (where the court reversed convictions under a statute the accused was not charged with, or tried for, violating). In *Russell, supra*, the Court noted that a vague indictment "requires the defendant to go to trial with the chief issue undefined", "enables his con-

viction to rest on one point and the affirmance . . . on another", and "gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture". The resemblance between the present case and the *Russell* case is strengthened by the fact that the accusation against petitioner failed to indicate which of the many different crimes embraced by §14:103 was charged.[8] But, the vices of this vague law, similar to those noted in *Russell,* would be present even if the subsection invoked by the state had been mentioned in the indictment. *Cole* v. *Arkansas,* 333 U. S. 196, 201, rests on the fundamental proposition "that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Petitioner Diamond, was as much deprived of notice of the charge against him—both because of the vagueness of §14:103 and because he was not told which subsection was invoked against him—as Cole was when he was convicted of a charge on which he was never tried. Indeed, Diamond cannot even know whether or not he was convicted of the charge on which he was tried, or what that charge was.

[8] Recognizing that §14:103 includes many different offenses, gathered together from various parts of earlier codes, the Louisiana Supreme Court has held that indictments failing to indicate which offense is charged are defective. *State* v. *Morgan,* 204 La. 439, 15 So. 2d 866 (1943); cf. *State* v. *Verdin,* 192 La. 275, 187 So. 668 (1939).

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York 19, New York

WILEY A. BRANTON
5 Forsythe Street, N. W.
Atlanta, Georgia

JOHNNIE A. JONES
530 South 13th Street
Baton Rouge, Louisiana

Attorneys for Petitioner